No. 331.
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JAMES H. McKENNEY, Clerk.
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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 331.

HENRY B. F. MACFARLAND AND OTHERS,
APPELLANTS,

vs.

JESSE BROWN AND ROSA WALLACH.

ARGUMENT AND BRIEF IN BEHALF OF APPELLEES.

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Supreme Court of the United States.

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HENRY B. F. MACFARLAND AND OTHERS,
APPELLANTS,

vs.

JESSE BROWN AND ROSA WALLACH.

ARGUMENT AND BRIEF IN BEHALF OF APPELLEES.

Statement of Facts.

This was a proceeding instituted by the Commissioners of the District of Columbia in the supreme court of the District, sitting as a district court, for the condemnation of certain lands needed for the widening and extension of Sherman avenue, under an act of Congress approved March 3, 1899. The provisions of this act material to the consideration of this appeal are the following:

"SEC. 5. That within ninety days after the approval of this act the Commissioners of the District of Columbia be, and they are hereby authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension and widening of Sherman

avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet.

"That of the amount found due and awarded for damages for and in respect of the land condemned under this act for the extension and widening of said Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines on the east and west sides of Sherman avenue as widened and extended: *Provided*, That no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

"SEC. 9. That the proceedings for the condemnation of the lands as provided for in this act shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of lands in said District for public highways; and to provide the necessary funds for the cost of such condemnation proceedings the sum of three thousand five hundred dollars is hereby appropriated out of the funds of the District of Columbia: *Provided*, That each juror shall receive a compensation of five dollars per day for his services during the time he shall be actually engaged in such services under the provisions of this act: *And provided further*, That no appeal by any interested party from any decision of the supreme court of the District of Columbia confirming said assessment or assessments shall delay or prevent the payment of said awards in respect to the property condemned."

Chapter 11, above referred to in section 9, commonly known as the "Highway Act," contains elaborate provisions for the condemnation of lands for public highways. The sections of this act which are material on the hearing of this appeal are the following:

"SEC. 252. Whenever application shall be made to the proper authorities, by residents of the District without the limits of Washington and Georgetown, to lay out a new or

alter any existing road, and whenever such authorities shall deem it conducive to the public interests to open a new road, or widen or change the course of an old one, the route of such road shall be surveyed, and a plat or map of the same prepared.

"SEC. 257. If any owner of land shall object and claim damages, and the amount cannot be agreed upon, the proper authorities shall direct the marshal of the District to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof.

"SEC. 260. The marshal shall summon the jury, and administer an oath or affirmation to them that they will, without favor or partiality to any one, to the best of their judgment, decide what damage, if any, each owner may sustain by reason of running the road through his premises.

"SEC. 261. In making their decision the jury shall take into consideration the benefit such road may be to each owner by enhancing the value of his land, or otherwise, and shall give their verdict accordingly.

"SEC. 262. The jury, having been upon the premises and assessed the damages, shall make out a written verdict, to be signed by them, or a majority of them, and attested by the marshal, which the marshal shall transmit to the proper authorities at their next meeting, and which shall be recorded.

"SEC. 263. If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury.

"SEC. 264. The verdict of the second jury, signed by each of the jurors, or a majority of them, shall be returned to the proper authorities at their next meeting and recorded as final and conclusive, and the road shall then be declared a public road, and opened as such.

"SEC. 265. In all cases where it becomes necessary to summon a second jury to assess damages, if the amount as-

sessed by the second jury shall not be greater than the amount assessed by the first, the costs of the second jury shall be paid by the parties objecting to the first verdict; but if greater, they shall be paid by the District. All expenses up to the second jury shall be paid by the District."

Acting under and by virtue of the provisions of this highway act, the marshal summoned a jury of seven, who viewed the premises, heard the testimony of witnesses, and rendered a verdict, filed in the cause May 9, 1900, awarding damages for the lands taken and assessing one-half of the damages so found as benefits to adjoining and nearby lands.

By a sort of tacit understanding between counsel for the several parties in interest, proceedings were stayed at this point until the final hearing in this court of another case wherein the constitutionality of the act of March 3, 1899, was assailed (181 U. S., 371). The validity of the act was upheld by this court and its opinion handed down on the 29th of April, 1901. Shortly thereafter the District Commissioners procured an order of ratification *nisi*, thus indicating for the first time their satisfaction with the verdict of the jury of seven. Immediately thereafter Mr. Brown and Mrs. Wallach, who, as the record discloses, own many parcels of land affected by the proposed widening and extension of Sherman avenue, filed exceptions to the verdict, award, and assessment of the jury of seven. These exceptions were overruled at the special term and an order entered on the 2d day of October, 1901, whereby the verdict was confirmed. From this order Brown and Mrs. Wallach appealed to the Court of Appeals of the District, assigning for error that—

"*The court erred in confirming the verdict of the jury of seven and refusing to order a jury of twelve.*"

The Court of Appeals reversed the judgment of the special term and remanded the case for further proceedings in conformity with its opinion (R., p. 18). From this ruling of the Court of Appeals the present appeal is being prosecuted by the Commissioners of the District of Columbia.

POINTS AND AUTHORITIES.

I.

An inspection of the record discloses that the verdict is unreasonable and oppressive; one item is unconscionable.

It will be perceived that the appellees are large owners of land on both sides of Sherman avenue, and that parts of many lots belonging to them are taken for widening that avenue, which runs through a thinly populated section of the District. The act provides that Sherman avenue shall be extended from Florida avenue to Whitney avenue, with the uniform width of one hundred feet. So wide a street in that locality is not called for by any present public need. We may assume, then, that when Congress passed the act of March 3, 1899, so far at least as it provides for the widening of Sherman avenue, it was legislating with a view to the possible future development of the city and District; and although in these latter days Congress has authority to determine what part of the cost of a proposed public improvement shall "be assessed upon the owners of lands benefited thereby" (167 U. S., 589), it may well be questioned whether or not any of the lands upon which assessments have been made are more benefited by this wide street than are the lands in other portions of the District. All other streets in that section are in the main but sixty feet wide, with the exception, perhaps, of Eleventh street, intended as a thoroughfare. And it may be further assumed that these streets are of sufficient width to accommodate all present needs.

An examination of the awards of damages and assessments of benefits in connection with the several lots belonging to appellees and the relative positions of these lots make it clear that gross inequalities are found in the verdict

in respect of the apportionment of benefits. Lots 1 and 13, block 18, have now a frontage of 150 feet on Marshall street. They can be subdivided into eight building lots, fronting south, of sufficient dimensions for houses in that neighborhood. The widening of Sherman avenue takes away nearly two of such lots, which are worth in the market today, according to the valuation made by the jury, an average of 55 cents per square foot, or $1,650. For this appellants are allowed $500, or a loss of $1,150, which sum they must contribute to a supposed public convenience, though no resulting benefit to either of these lots is apparent. The same is true of lots 1 and 12, block 15, of lots 10 and 11, block 14, and of lots 12 and 13, block 5.

In block 5, lot 17, appellants lose a lot fronting 20 feet on Steuben street, by a depth of 50 feet, for which they are allowed the munificent sum of $25, the difference between the award of damages and the assessment of benefits in respect of that lot.

In block 11, lot 8, appellants have now a frontage of 150 feet on Irving street by a depth of 50 feet. The portion of this lot included in the proposed widening of Sherman avenue 30 x 50 feet has now a north and south frontage. For this the jury allowed a net amount of but $50, the difference between damages and benefits.

For lots 17 and 18, block 17, appellants are allowed $175 net for the part taken from each, although no frontage is lost. Here benefits and damages might possibly be computed as offsetting each other.

When we examine the jury's award of damages and supposed benefits in respect of part of lot 3, block 19, we find inequality which practically amounts to confiscation. Of this lot appellants now own the northern triangular portion, with a present frontage on Sherman avenue of 218.6 feet and a depth along the south line of 60 feet. With these dimensions the lot contains 10,042 square feet. Of this area 5,487.5 feet will be taken when the avenue is widened as

projected, and the amount awarded therefor is $4,116, or at the rate of 75 cents per square foot. This, then, in the opinion of the jury, is the present value of the lot, and according to this the entire lot—10,042 square feet—is worth $7,531, without allowing any increase in value by reason of the proposed widening of the street.

When the street is widened there will remain to the appellants a very much smaller triangular piece of ground, with a frontage on the avenue of but 147.2 feet, a greatly reduced basic line, and an area of 4,555 square feet. Although this bit of land is not available for any valuable use, there is an assessment against it as for benefits of $3,410, or at the same rate per square foot (75 cents) as the damages awarded for land taken. On all other lots the rate of assessment is, at an average, less than 10 cents a square foot.

Figured another way, the result is still more startling. According to the estimate of the jury, the part of lot 3 belonging to appellants is worth $7,531, being for 10,042 square feet at 75 cents per foot. Of this, 5,487 feet are taken, and they are to be paid for it $706, being the difference between the damages awarded, $4,116 (R., p. 5), and the assessment charged, $3,410 (R., p. 13). Wherefore, to come out whole, the appellants must sell the part of this lot which is left, 4,555 square feet, for $6,825, being the present value of the lot, $7,531, less the net result of the taking, $706. In other words, they must sell the little piece which is left for about $1.50 per square foot—a thing they could scarce hope to do in another hundred years of District growth.

The only "judicious" juror in this combination of seven seems to have been A. D. Hazen, who regretted his inability to agree with the majority "on the question of an equitable apportionment among the several pieces of land of the gross amount assessed as benefits and needed to meet the award for damages" (R., p. 5). It almost looks as if the other six of this jury of seven, when they reached the top of the street, dumped upon this little triangular lot belonging to appellees

all that was left of the *amount needed to make up the award of damages.* In this way the two sides of the equation contemplated by the act—assessments for benefits = one-half award of damages—are maintained. This is "substantial injustice" and "manifestly wrong," the two elements which induce courts to set aside verdicts in such cases.

II.

The appellees having indicated dissatisfaction with the verdict of the jury of seven, the District authorities have no power to proceed further in the cause without first procuring a jury of twelve to be summoned.

The act of March 3, 1899, of itself provides no machinery for ascertaining the value of the lands to be condemned for the proposed public improvement or estimating the benefits which it is assumed will accrue to adjoining lands. This is to be accomplished by the agencies provided by chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, to which reference is made, and this latter act recourse must be had to ascertain the respective rights and immunities of the public and the landowner.

The rule of construction in such cases is well stated by Mr. Chief Justice Marshall in the case of United States *vs.* Simms, 1 Cranch, 252, where, in commenting upon the acts of Congress of the 27th of February and 3d of March, 1801, relating to the District of Columbia, he said that the laws of Maryland were by those acts "considered as having been re-enacted by Congress *totidem verbis.*"

And in a more recent case in the Court of Appeals (Peake *vs.* United States, 16 App., D. C., 415), the same rule of construction was followed in a suit upon a bond given by a con-

tractor for Government work, as required by an act of Congress of August 13, 1894, entitled "An act for the protection of persons furnishing material and labor for the construction of public works." In this case the point was made that there could be no recovery on the bond, because it did not contain such provisions as the act required for the protection of material men and others, though such provisions were found in the contract, to which reference was made in the bond. But the court held the point not well taken and say in its opinion (p. 419):

"Plainly, therefore, the contract is as much a part of the bond as though it had been copied verbatim into it; and when the bond sufficiently indicates the covenants which it intends to secure, we know of no dictate of reason or rule of law that would require their repetition in the bond."

In the case of Quackenbush *vs.* District of Columbia, 20 D. C., 300, the highway act was the subject of consideration. True it may be the point now under discussion—the right to have a jury of twelve—was not presented in the Quackenbush case, but the purposes of the act are very clearly stated by Mr. Justice James, who announced the judgment of the court in the following significant language:

"The provisions of this statute are to be read in the light of the constitutional provision which forbids even the whole nation to take for its own use the property of an individual without just compensation for it. His right to retain that property, or to have its equivalent, is thus surrounded with an inviolable character. A statute which should disregard that right would itself be a nullity and no statute is to be construed to intend any jeopardy or diminution of it unless such intention be too plain to be ignored. On the other hand the legislature is to be understood to require the most complete observance of provisions for an opportunity to secure just compensation, especially because they are made for the protection of the individual owner in a proceeding which is, in contemplation of law, wholly *in invitum*. From this point of view it is plain that the statute before us intends the advertised notice to be effective as a protective

warning; and, therefore, intends that it shall be such a notice as shall inform the owner of the land that it is his land that is about to be taken for public use."

If strictness of notice be required, why should other provisions of the act intended for the protection of the property-owner be ignored? The more especially should every such provision be given its full effect in view of the fact that Congress has power to provide by legislative enactment "that, of the amount found due and awarded as damages for and in respect of the land condemned for the opening of said streets, not less than one-half thereof should be assessed by the jury in said proceedings against the pieces or parcels of ground situated and lying on each side of the extension of said streets" (181 U. S., 381) as benefits to such lands. This carries the right of the sovereign to take private property for public use to a point of extreme danger to the individual. It is an arbitrary assessment, "irrespective of the actual amount of benefit," and leaves nothing to the jury "but to apportion at least one-half of the cost, and as much more as they may think proper, between the adjacent lots."

Wherefore, as Justice James well said, "the legislature is to be understood to require the most complete observance of provisions for an opportunity to secure just compensation." The most marked of these is the right of appeal from a jury of seven to a jury of twelve.

It may well be that the Congress had in mind the protective features of chapter eleven when the act of March 3, 1899, was passed. The highway act became a law before governmental centralization, extension, and expansion had reached their present stages of development. It created two agencies or tribunals for safe-guarding private rights against encroachment in the name of the public. One of these is a "jury of seven, judicious, disinterested men, not related to any party interested" (sec. 257); the other is a jury of twelve, also required to be "judicious, disinterested and not related

to any party in interest" (sec. 263). To this latter an appeal is given, as matter of right, as well to the "proper authorities" as to "any owners of the land," in the event that they or any of them are dissatisfied with the verdict of the jury of seven. To prevent captious objections on the part of landowners, it is further provided that "if the amount assessed by the second jury shall not be greater than the amount assessed by the first, the costs of the second jury shall be paid by the parties objecting to the first verdict" (sec. 265). This is nothing more nor less than an appeal from a statutory tribunal (the jury of seven) to a tribunal whose establishment antedates our Constitution, and is referred to in Magna Charta as "the principal bulwark of our liberties."

As is said by Mr. Justice James (20 D. C., 314):

"It is not to be supposed that when they embodied their ancient tradition in their constitution, this people intended to alter the relations of private right and public benefit. It was not alone the former that they considered. As they had said in the preamble to that instrument, they were engaged in providing for 'the general welfare,' and this protection of private property was understood by them to be one of the means of promoting that welfare. They knew, as well as Blackstone did, that, 'the public good is in nothing more interested than in the protection of every individual's private rights, as modified by the municipal law;' and in thus securing 'every individual's private rights,' they substantially affirmed that the general welfare and true public policy require that communities shall make compensation for what they take, and that they shall not evade that obligation by any construction."

It has been the uniform practice of the supreme court of the District to order a second jury in proceedings under the highway act, when any person whose land was being condemned indicated dissatisfaction with the verdict of the jury of seven. No case seems to have found a place in the published reports, though the point was directly passed upon by the court in general term in the proceeding instituted for

the condemnation of lands for the new library building (cause No. 333 on the District court dockets). This case was certified from the special to the general term on exceptions of a land-owner to the verdict of the jury of seven. The general term remanded the cause, with directions to summon a jury of twelve (5 Minutes General Term, p. 437, July 9, 1886).

A more recent case (district court, No. 543) is the proceeding for the condemnation of lands needed for the widening of Nineteenth street under an act of Congress approved February 25, 1899 (30 Statutes at Large, p. 891). The act provides that "such proceedings shall be prosecuted under and in accordance with the provisions of sections two hundred and fifty-seven and two hundred and sixty-seven, both inclusive, of the Revised Statutes of the United States relating to the District of Columbia, concerning the condemnation of lands in said District for public highways," the same being sections of the highway act. On the 4th of March, 1899, a jury of seven was summoned, and a verdict returned by them. With this verdict the "proper authorities," the Commissioners of the District, were dissatisfied, and filed a petition in the cause averring that the amount awarded as damages for the lands condemned was "excessive and beyond the just value thereof." A second jury of twelve was forthwith summoned, as matter of course. The only possible distinction between the two cases consists in the fact that in the Nineteenth Street case the Commissioners of the District were dissatisfied with the verdict of the jury of seven, whereas in this case the complaint comes from private individuals, who assert that the amount found due and awarded by the jury of seven as damages for lands taken is "insufficient and inadequate" and the assessment for benefits is "excessive and exorbitant" (R., p. 6).

It is difficult to conceive how the appellees could have made known more positively and emphatically the fact that they were and are dissatisfied with the verdict of the jury of

seven. Surely it cannot be necessary for them to employ the very words used in the statute and say they are "dissatisfied with the verdict." This would be a frittering away of substantial rights guaranteed by the Constitution and recognized in the statute.

Nor yet was it necessary for the appellees to in terms ask for the summoning of a jury of twelve. On this point the opinion of the court below, announced by Mr. Chief Justice Alvey, is unanswerable. He says (R., p. 17):

"But it must be borne in mind that it was not the duty of the appellants (appellees now), as owners of the lands proposed to be condemned, to demand a summoning of a second jury. The statute does not require it of them. That is the duty of the authorities authorized to institute and prosecute the proceedings of condemnation to completion. The owners of the lands proposed to be condemned are placed in the position of defendants, or opponents of the proceeding of condemnation; and, consequently, all affirmative acts prescribed by the statute in perfecting the proceeding, must be shown to have been complied with by the parties authorized to take and prosecute the proceeding. The whole proceeding is strictly statutory, and it must be affirmatively shown that all the provisions of the statutes that apply to the proceedings have been substantially complied with otherwise the whole proceeding would be void and without effect."

In Bauman *vs.* Ross, 167 U. S., 548, the late Mr. Justice Gray elaborately reviews the several acts of Congress embodied in the highway act. After commenting upon the various provisions of these several acts, and the right and duty of the jury of seven to consider the question of benefits in making up their verdict, he says (572):

"If the court or any land-owner was dissatisfied with that verdict, the matter might be submitted to the verdict of a jury of twelve, proceeding as before, the verdict of whom, or of a majority of whom, was final."

The argument *ab inconvenienti* urged in the court below by the learned corporation counsel—that to set aside verdicts of

juries of seven in street-extension cases where the land-owners are dissatisfied therewith would lead to infinite confusion and might destroy the equation which must subsist between awards and assessments—was effectually disposed of by Mr. Justice James in the Quackenbush case, *supra* (20 D. C., 312), where he so well says:

"It is worth while, however, to note an argument *ab inconvenienti* which is stated in the form of an averment in the answer. It is there alleged that, if the construction insisted on by the complainant, and now conceded by the court, should prevail, the statute itself would be virtually nullified.

"We can only understand this to be a suggestion that the public cannot afford to take land for streets and roads on the terms which would result from that construction of the law; and that the alleged practice of the last quarter of a century should be sustained because it works an economy in the taking of private property for public use. Such a suggestion implies that this economy is to be accomplished by an early cutting off of claims, in case an owner, who might not be willing, and might not intend, to give his property without compensation, should be slow in demanding it.

"We suppose there is no public policy which requires the executive, much less the judicial authorities, to be astute to diminish the chances of a demonstrable private right; especially of a right which the people have been so careful to guarantee by their fundamental law. The rights of the individual are at all times, even with the best protection, in jeopardy enough from combined private interests; and even public power has a tendency to disregard them. It was just because of the known readiness of communities to satisfy their convenience at the cost of the individual, that this guaranty was provided. We are not left to infer its meaning and temper from this single line of the fifth amendment. An intense estimate of private right had been a tradition of the race from a time even beyond *Magna Charta*."

Wherefore it is respectfully submitted that the judgment of the Court of Appeals is correct and should be affirmed.

SAMUEL MADDOX,
Attorney for Appellees.

Supreme Court of the United States.

No. 331.—October Term, 1902.

Henry B. F. Macfarland, John W. Ross and John Biddle, Commissioners of the District of Columbia, Appellants,
vs.
Jesse Brown and Rosa Wallach.

Appeal from the Court of Appeals of the District of Columbia.

[December 1, 1902.]

Under the act of Congress entitled "An act for the extension of Pennsylvania avenue southeast, and for other purposes," approved March 3, 1899, (30 Stat. 1381,) the Commissioners of the District of Columbia were by the terms of section 5 of said act "authorized and directed to institute a petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet." The provisions of said section 5 are as follows:

"Sec. 5. That within ninety days after the approval of this act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet.

"That of the amount found due and awarded for damages for and in respect of the land condemned under this act for the extension and widening of said Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines, on the east and west sides of Sherman avenue as widened and extended: *Provided*, That no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

Under the authority thereby conferred a petition was filed by the Commissioners of the District of Columbia in the Supreme Court of the District of Columbia, sitting as a District Court, upon the 31st day of May, 1899, being No. 555 on the District Court docket, praying that the court direct the marshal of the District of Columbia to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and

appear on the premises on a day specified, to assess the damages, if any, which each owner of land through which Sherman avenue is proposed to be extended and widened, as aforesaid, may sustain by reason thereof, and that such other and further orders might be made and proceedings had as were contemplated by said act of Congress and by chapter XI of the Revised Statutes of the United States relating to the District of Columbia, to the end that a permanent right of way for the public over the said lands might be obtained and secured for the aforesaid extension and widening of Sherman avenue.

Upon this petition the said court on the 16th day of September, 1899, passed an order requiring interested parties to appear in said court on or before the 2d day of October, 1899, and show cause why the prayer of said petition should not be granted, and why the proceedings directed in said act of Congress should not be taken. Pursuant to such order, the jury was summoned and empaneled by the marshal, and upon the 7th day of February, 1900, were sworn according to law, and thereafter the said jury proceeded according to the provisions of chapter XI of the Revised Statutes of the United States relating to the District of Columbia, and having been upon the premises, in accordance with said statute, on the 1st day of May, A. D. 1900, made out their written verdict, which was signed by a majority of the said jurors. Upon the 9th day of May, 1900, the same was filed in the said court under the act of March 3, 1899.

Thereafter, on the 3d day of July, 1901, the trial court passed an order *nisi* confirming said verdict, and requiring all parties to appear and show cause on or before July 22 why such verdict should not be finally confirmed by the court. Upon July 22, 1901, the appellees, in response to said order, filed their exceptions to said verdict.

The court, having heard arguments upon the said exceptions, on October 2, 1901, passed an order overruling the said exceptions and finally ratifying and confirming in all respects the said verdict.

Thereupon the appellees appealed the case to the Court of Appeals. The Court of Appeals reversed the trial court, from which decision the Commissioners of the District of Columbia have appealed to this court.

Mr. Justice SHIRAS delivered the opinion of the Court.

Whether those provisions of section 263 of the Revised Statutes of the District of Columbia which provide for a second jury are applicable to this proceeding under the act of March 3, 1899; whether, if entitled to a second jury, the appellees waived such right by filing, in the Supreme Court of the District, exceptions to the verdict and award of the first jury and by appealing from the order of that court, overruling their exceptions and affirming said verdict and award, to the Court of Appeals of the Dis-

trict: and whether it was the duty of the Commissioners, and not the duty of the parties claiming to have been dissatisfied with the verdict, to demand a second jury, if a right to such jury exists, are important questions, and we can well understand why those who are entrusted with the administration of the law are anxious to have them speedily and finally determined.

But we are of opinion that the case is not before us in a condition to make it our duty to deal with those questions. The decree of the Court of Appeals, reversing the order of the Supreme Court, and remanding the cause to that court, "that proceedings may be taken and a jury of twelve ordered as directed by the statute," is not a final decree from which an appeal will lie to this court.

It is contended by the learned counsel of the appellants that the case is within the rulings of this court in *Phillips* v. *Negley*, (117 U. S. 665,) and in *Humphries* v. *District of Columbia*, (174 U. S. 190.) It is true that in the first of those cases this court entertained a writ of error to the Supreme Court of the District and reversed its judgment. But, in disposing of the question raised whether the judgment of the court below was or was not a final judgment, this court said:

"Interpreting the judgment of the general term by the opinion of the learned judge who spoke for the court, we must infer that it was intended to dismiss the appeal for want of jurisdiction to entertain it, on the ground that the order of the special term, vacating its own judgment, rendered at a previous term, was not only within the power of that court, but was so purely discretionary that it was not reviewable in an appellate court. The same consideration is urged upon us as a ground for dismissing the present writ of error for want of jurisdiction in this court, it being alleged that the order of the Supreme Court of the District at special term is not only within the discretion of that court, but that, as it merely vacates a judgment for the purpose of a new trial upon the merits of the original action, it is not a final judgment, and therefore not reviewable on writ of error. If, properly considered, the order in question was an order in the cause, which the court had power to make at the term when it was made, the consequence may be admitted, that no appellate tribunal has jurisdiction to question its propriety; for, if it had the power to make it, and it was a power limited only by the discretion of the court making it, as in other cases of orders setting aside judgments at the same term at which they were rendered, and granting new trials, there would be nothing left for the jurisdiction of an appellate court to act upon. The vacating of a judgment and granting a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed. If, on the other hand, the order was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court. The question of the jurisdiction of this court to entertain the present writ of errortherefore necessarily involves the jurisdiction of the Supreme Court of the District, both at special and general term, and the nature and effect of the order brought into review, so that the question of our jurisdiction is necessarily included in the question of the validity of the proceeding itself. The legal proposition involved in the

judgment complained of, and necessary to maintain it, is, that the Supreme Court of the District at special term has the same discretionary power over its judgments rendered at a previous term of the court, without any motion or proceeding to that end made or taken at that term, to set them aside and grant new trials of the actions in which they were rendered, which it has over judgments, when such proceedings are taken during the term at which they were rendered; and that, this being true, the proceeding and order of the court, in the exercise of this jurisdiction and discretion, cannot be reviewed on appeal or writ of error."

The court proceeded to consider the question at length, and having determined that the Supreme Court of the District had no discretionary power to set aside judgments obtained at a previous term where no proceeding for that purpose had been taken at that term, held that the court had acted without jurisdiction, and that its judgment was void and reviewable on error.

The distinction between that case and the present one is, therefore, seen in the fact that, in the one, the Supreme Court of the District acted without jurisdiction, and in the other the Court of Appeals was in the regular exercise of its appellate power in reversing the judgment of the Supreme Court of the District and awarding further proceedings. Such action in the present case may have been erroneous, but if so we cannot correct it until brought before us by an appeal from a final judgment. The further proceedings may possibly reach such a result that neither party will desire an appeal.

In *Hume* v. *Bowie*, (148 U. S. 245,) where this court dismissed a writ of error to the Supreme Court of the District of Columbia upon the ground that the judgment brought here by the writ was not a final judgment, the case of *Phillips* v. *Negley* was considered, and the distinction between a judgment ordering a new trial when the court has jurisdiction to make such an order, and a judgment where such jurisdiction does not exist, was pointed out by the Chief Justice, and where it was held that, in the former case, where jurisdiction existed, a judgment setting aside the judgment of the trial court, and awarding a new trial, is not a final judgment reviewable on error, and in the latter case, where jurisdiction had ceased to exist, by reason of lapse of time, a judgment awarding a new trial is without jurisdiction, would be an order in a new proceeding, and, in that view, final and reviewable.

The other case relied on, *Humphries* v. *District of Columbia*, was a case where, in the Supreme Court of the District, a verdict had been signed by all twelve of the jurors, but one of them was disabled by illness from being present in court when the verdict was delivered. Upon this verdict a judgment was entered. Proceedings in error were taken, but were dismissed by the Court of Appeals on account of a failure to have the bill of exceptions prepared in time. Thereafter, and at a succeeding term, the

defendant, against whom judgment had been entered, filed a motion to vacate the judgment on the ground that there was no valid verdict, which motion was overruled. On appeal to the Court of Appeals this decision was reversed and the case remanded, with instructions to vacate the judgment, to set aside the verdict and award a new trial. This ruling was based on the proposition that the verdict was an absolute nullity, and therefore the judgment resting upon it void, and one which could be set aside at any subsequent term. This view of the nature of the verdict was not approved by this court, which held that the defect or irregularity in the rendering of the verdict was mere matter of error, and not one which affected the jurisdiction.

In the present case no attack is made on the jurisdiction of either the Supreme Court of the District or of the Court of Appeals. That the decree of the latter court was not meant to be final is shown by its language, which does not definitely adjudge the whole subject matter, but anticipates further action of the Supreme Court. The litigation of the parties on the merits of the case has not been terminated. "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term, as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered." (*Bostwick* v. *Brinkerhoff*, 106 U. S. 3.)

We do not overlook the fact that this statement of the law was made in a case where the appeal was taken directly from the decree of the trial court; but we think the principle on which the rule rests is applicable where the appeal is from the decree of an intermediate appellate court.

We are unwilling to make any departure from the rule that demands finality in a decree to render it subject to review on appeal. It would be very unfortunate if mere errors in the administration of statutes, of this character, not going to their validity, or to the jurisdiction of the courts below, could be brought here, from time to time, in advance of a final disposition of the controversy.

The appeal is *Dismissed.*

True copy.

Test:

Clerk Supreme Court, U. S.